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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976
No. 76-426

HAROLD FELDMAN and 43 MEMBERS of the STATE OF CALIFORNIA, BUREAU OF NARCOTIC ENFORCEMENT,

Objecting Creditors, Petitioners,

vs.

ARTHUR KUNKIN, dba CONTINUUM GRAPHICS, ALFREDS NEWSPAPER PRINTING CO.

Bankrupt Respondent.

PETITION FOR WRIT OF CERTIORARI

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TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT:

Petitioner, HAROLD FELDMAN, and 43 members of the State of California Bureau of Narcotic Enforcement, prays that a Writ of

Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit filed June 21, 1976, affirming the discharge of debt, owed by respondent to petitioners, pursuant to Section 17 of the Bankruptcy Act, and that on hearing, the judgment discharging the debt be reversed.

OPINIONS BELOW

The Order of the Court of Appeals (Pet. 1) is attached hereto and no opinion has been written.

An opinion of the District Court finding that the publication by respondent was not "malicious" within the meaning of Section 17c of the Bankruptcy Act. (Attached hereto)

JURISDICTION

The judgment of the Court of Appeals was filed on June 21, 1976. The Court further ordered that a Petiton for Rehearing would not be entertained. This Court has jurisdiction under 28 U.S.C.A. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the court erred in making specific findings and conclusions that the respondent's act of publishing a stolen list of California State Narcotic Agents names, home addresses and telephone numbers was intentional, but not malicious?

2. Whether the finding was clearly erroneous in the light of the evidence before the Court?

3. Whether or not the debt should be discharged pursuant to Section 17 of the Bankruptcy Act?

STATEMENT OF THE CASE

The Respondent was the editor and publisher of a "Newspaper" known as the Los Angeles Free Press. The Respondent acquired a stolen confidential list of the names, home addresses and telephone numbers of the agents of the California Department of Justice, Bureau of Narcotic Enforcement. These agents would be commonly considered "undercover narcotic officers." The Respondent published the list, verbatim, of eighty of these undercover officers who subsequently sued the Respondent in the California State Court for intentional invasion of privacy and the same Respondent stipulated to judgment for $43,000.00 as to 43 of those agents,

the judgment providing that it was for the intentional tort of invasion of privacy.

The evidence before the Court showed that there was no story written on the date of publication, but merely the printing of the list of home addresses, phone numbers and names with the caption "KNOW YOUR NEIGHBORHOOD NARC."

ARGUMENT

Although the First Amendment of the United States Constitution provides for freedom of the press, the news media, through its publishers, have the duty, when publishing material for distribution, not to place innocent people in danger.

A publisher is duty-bound to act as a reasonable publisher should act. When a publisher performs acts which are unreasonable and obviously malicious, his acts cannot be protected in any way. He subjects himself to liability for the damages he has caused.

It was and it is obvious to even the casual observer that the intention of the Respondent was to annoy, harrass, injure, and interfere with the lives and employment of the Petitioners.

Immediately following the publication of the Narcotic Agents' names and addresses in

Respondent's "Newspaper," there was a public outcry as to the irresponsibility of the act.

Other newspapers, television and radio stations condemned the act. A KABC Radio Editorial on August 13, 1969, by Joe Nevens said:

> "As a commercially successful example of the so-called 'underground press,' the Los Angeles Free Press has been 'winging it' for some time. Its aim is to print what others see fit not to print. Its very existence is a testimony of sorts to the strength of our democratic society . . . the same society which the Los Angeles Free Press is so quick to vilify.
>
> "Continued printing of the L.A. Free Press is traced to the many battles for press freedoms waged and won by the so-called 'establishment media' and its staffers. But now, the L.A. Free Press has abused that press freedom license.
>
> "In a current edition, the L.A. Free Press prints what it claims to be the names, home addresses and phone numbers of some 80 men . . . all assertedly state narcotics agents.

That listing is printed in the words of the L.A. Free Press, as 'a public service announcement.' What an absurdity. This is surely the height of irresponsibility. It is also an overt attempt to harrass law enforcement personnel.
By printing those phone numbers and addresses, the L.A. Free Press has made innocent families . . . women and children . . . the potential prey of cranks, nuts and criminals. 'Though the L.A. Free Press may allege that its publication is aimed at preserving all kinds of freedoms . . . we say that the L.A. Free Press is 'selling out' . . . as well as invading the privacy of individuals . . . a freedom that the L.A. Free Press assertedly charishes so much.

"KABC believes that the L.A. Free Press has invalidated its credentials . . . and we condmn those responsible for the irresponsibility."

In the minds of reasonable men one need merely look to the words spoken and the acts performed by the wrong-doer to establish malice.

In the record of the present case, the Respondent stated,

> "I am, however, opposed to the assumed police function of acting as censor of public morals where there is so-called 'crime' without victims, and where the police, in enforcing difficult laws, become violative themselves of constitutional rights." (Page 3 of the record.)

The Respondent's intent is clear and convincing. He published the list of names so that a criminal element in our society could mete out their type of "justice" on these agents and their families.

The respondent states in the record that he published ". . . an apology by me to the families of the narcotic agents . . . ." (Page 2), but no apology to the agents.

It is unquestionable that in the minds of reasonable men, the Respondent's act of publishing and distributing the agents' names and home addresses were unconscionable, outrageous and malicious. A list of names and addresses of California narcotic agents published in a "newspaper" such as the L.A. Free Press published primarily for those readers with distorted and warped minds, screams of malicious intent.

In the case at bar, there is no question that the list published was wilful and intentional.

The U.S. Supreme Court in the case of Tinker v. Colwell, at 193 U.S. 473, held that in defining "wilful," that it was synonymous with intentional and voluntary and the court also went on to say and in so saying quoted with approval the case of Bromage v. Prosser, 4 Bar & C. at 247 U.S. that:

> ". . . malice in common acceptance means ill-will against a person; but in its legal sense, means a wrongful act done intentionally without just cause of excuse."

The Court further stated,

> ". . . setting a disregard of what one knows to be his duty, an act which is against good morals and wilful in and of itself and which necessarily causes injury, and is done intentionally, may be said to be done wilfully and maliciously so as to come within the exception."

In that case, the Supreme Court rejected the contention that there had to be a specific malice and further rejected a requirement that there be an intent to harm the claimant.

The Bankruptcy Judge in the case at bar, at the conclusion of the hearings, stated that he feels the act was wilful (R. T. p. 57, lines 3-4). However, the Court felt that there was no malice shown. A reading of the entire transcript of the

evidence makes it clear that the act was done with malice, was done with the intent to harm, and to believe otherwise of a newspaper that is distributed among a sub-culture that is anti-police is not only naive, but is a failure to recognize the reality of life. The state of mind of an individual can never be proven as a rule, except by his acts and the material consequences that flow from his acts. For Mr. Kunkin to say that he had no ill-will or malice is of little consequence and little relevance when one examines the horrendous consequences that could have flowed from his acts and that any reasonable person would have known the consequences of his act. In Haerzuck v. Thompson, 228 F.2d 72 (11-14-55), 10th Circuit, Honorable Judge Bratton, it was said,

". . . the boundaries of wilful and malicious conduct causing injury to the person or property of another within the purview of Section 17 of the Act do not lend themselves completely to a clear and definite pattern available for ready use in every case involving the question of non-dischargeability. But it is settled law that such conduct does not necessarily mean or involve a malignant spirit of a specific intention to injure a particular person or harm his property. A wilful disregard of that which one knows to be his duty, or an act which is wrongful

> in and of itself, and which necessarily causes injury, if done intentionally, is done wilfully and maliciously within the scope of the exception to dischargeability created by the Statute."

In the case of In re Drowne (1954), 124 Fed. Supp. 842, the action of the bankrupt in discharging an air rifle in the direction of the judgment creditor was wilful and without just cause and was done in clear disregard of the obvious possibility that the latter might be injured thereby. Under such circumstances, the court is of the opinion that the claim of the judgment creditor is a claim for wilful and malicious injury within the exception of Section 17(2) even if the bankrupt did not intend as he insists, contrary to the finding of the referee, to strike him.

A wilful and malicious injury has been defined as follows:

> ". . . a wilful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done wilfully and maliciously, so as to come within the exception. . ." Van Epps v. Anfdenkamp (1934), 138 Cal. App. 622, 623, quoting from Tinker v. Colwell, supra.

It has also been held that a "wilful and malicious" injury in the Bankruptcy Act and everywhere in the law does not necessarily involve hatred or ill-will as a state of mind but arises from a wrongful act done intentionally, without just cause of excuse . . . . (In re Drowne, JE., supra, quoting Tinker v. Colwell, 193 U.S. 473.)

In an Opinion written by the Honorable Howard Hilgendorf, Judge of the United States District Court for the Eastern District of Wisconsin, under Case No. 71-B-1699, dated September 26, 1972, the Court therein in the case cited as In re the Bankruptcy of George Francis Vander Zanden held that a judgment of conversion based on the sale of snowmobiles that were subject to a security agreement without paying over the funds to the secured party upon the sale of said snowmobiles, resulted in a non-dischargeable debt, defining the same to be wilful and malicious. The basis of the Opinion in that case was that the sale of secured property was a wrongful act and that a wrongful act was wilful and malicious and it did not require any hate or ill-will, but merely a wrongful act done intentionally. In that case, the Court cited Pelikan v. Russell, 29 Wisc.2d 308, and Davis v. Aetna Acceptance, 293 U.S. 328, as authority for the ruling.

The Vander Zanden case is cited in the American Bankruptcy Law Journal, Volume 47, Page 65, Quarterly Journal for Winter 1973 wherein extensive discussion of Section 17a2 of

the Act is found.

Public policy dictates that one who sets the stage, which causes injury to well over 100 people, should not be allowed to discharge his acts of irresponsibility and malicious conduct. In this case, there is a clear plan, scheme and design to cause injury to others with the intent to shun accountability.

REASONS FOR GRANTING WRIT

Based on the above, and the facts in the record, it is the Petitioner's view that the District Court Judge's findings and conclusions were clearly erroneous in that the respondent's acts were malicious. Therefore, the debt should not be discharged. Circuit Judges Wright and Goodwin of the United States Court of Appeals for the Ninth Circuit should have joined Judge Choy, of said Court, and reversed the ruling of the Judge of the District Court.

Respectfully submitted,

BRUCE P. WOLFE

Attorney for Petitioner